SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

THE GEORGE WASHINGTON UNIVERSITY,
Petitioner,

v.

THE DISTRICT OF COLUMBIA, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 16, 2003

25 pp

QUESTIONS PRESENTED

I. Once a court has determined that a university has a constitutionally protected "property interest" with which local regulators have interfered, may the court uphold the regulation in a substantive due process challenge if the regulators articulated a facially illegitimate government purpose?

II. If a regulation that interferes with a university's property interest also interferes with the university's self-governance so as to implicate issues of academic freedom, should the regulation be subject to a heightened standard of constitutional review?

III. Can a land use regulation that is openly discriminatory against a non-suspect class of persons withstand equal protection scrutiny if its stated purpose is not designed to further a legitimate government interest and in fact is explicitly barred by the local jurisdiction's "bedrock policy" and law?

PARTIES TO THE PROCEEDING

I. Petitioner

The George Washington University

II. Respondents

The District of Columbia

Mayor, Anthony Williams

District of Columbia Board of Zoning Adjustment ("BZA")

BZA Chair, Geoffrey Griffis

BZA Members Anne Renshaw, David Levy and Carol Mitten

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PETITION FOR A WRIT OF CERTIORARI

The George Washington University hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a-20a) is reported at 318 F.3d 203 (D.C. Cir. 2003).

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2003. The court of appeals denied a timely petition for rehearing on March 18, 2003. (App. 160a-161a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The constitutional provision, statutes and regulations involved are the Fifth Amendment of the United States Constitution, 42 U.S.C. § 1983, the District of Columbia Human Rights Act, D.C. Code § 2-1401.01 *et seq.*, and D.C. Code § 6-641.02 and regulations promulgated thereunder. They are reproduced in Appendix G. (App. 162a-182a.)

STATEMENT OF THE CASE

Introduction. The court of appeals upheld a Board of Zoning Adjustment Order ("BZA Order") crafted with the expressed goal of reducing the number of student residents in a neighborhood that the BZA sought to preserve for "non-students." (App. 11a (describing the BZA's purpose as, "to limit or reduce the number of students in the area").) Despite the facial illegitimacy of that goal, the District of Columbia Circuit reversed the district court's order striking down the BZA action as a violation of GW's substantive due process rights. The court of appeals applied an analytical framework

different from that articulated by other circuits and inconsistent with guidance from this Court requiring government action to serve a "legitimate government interest[]." *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). The court of appeals also refused to apply equal protection principles because the case did not involve a suspect class.

The federal courts have understandably been loath to "sit as a zoning board of appeals," *see Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting), and accordingly favor deferential review of constitutional challenges to local zoning action. Without any concrete statement from this Court as to the proper criteria applicable to substantive due process challenges to quasi-legislative action,[1] in this case, the court of appeals went too far. Its forgiving opinion sets a dangerous standard that opens the door to intentionally discriminatory land use regulation that targets classes of persons rather than property. By ignoring the basic illegitimacy of the governmental interest served by the regulation before it, the court endorsed a standard that authorizes the federal courts to overlook virtually any violation of state law and policy by local regulators, provided that a minimum rationality can be ascribed to the means devised to achieve even illegitimate ends. This Court now has the opportunity to provide acutely-needed clarification in this difficult area.[2]

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[1] *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (setting standard for "abusive *executive* action"); and *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, __ U.S. __, 123 S. Ct. 1389, 1396 (2003) (evaluating substantive due process challenge to ministerial act by applying standard applicable to executive action).

[2] *See* Stewart M. Weiner, Comment, *Substantive Due Process in the Twilight Zone: Protecting Property Interests From Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467 (1996).

Relevant Regulatory Framework. GW has been located in the "Foggy Bottom" area of the District of Columbia since 1912. The University's Foggy Bottom campus is located on 43 urban acres. Not one square inch of the campus is zoned for single-family, or any low-density residential use. It is all zoned for either commercial, special purpose (a mix of high-density residential and commercial) or high-density residential use.

Since the 1970's, GW has been subject to the city's "campus plan" zoning regulations. Under that scheme, each university in the District must periodically seek BZA approval in concept of a "campus plan" that describes the university's plans for development over the succeeding years. *See Levy v. D.C. Bd. of Zoning Adjustment,* 570 A.2d 739 (D.C. 1990). It is GW's plan for the period from 2000-2009, and the BZA's Order conditioning approval of that plan, that are at issue in this case. While the BZA has some latitude in approving such campus plans based on record evidence, the court of appeals concluded that District law sufficiently constrained that discretion such that GW has a constitutionally protected property interest in its right to use its campus for university purposes. (App. 7a-10a.)

Pursuant to campus plan approvals, the BZA has historically imposed appropriate requirements on a university's proposed expansion of campus boundaries, including traffic management, density restrictions, noise limitations and other planning measures aimed at legitimate land use concerns. *See, e.g., Spring Valley Wesley Heights Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 644 A.2d 434 (D.C. 1[illegible]); *Citizens Ass'n of Georgetown v. D.C. Bd. of Zoning Adjustment*, 403 A.2d 737 (D.C. 1979). GW's previous approved campus plan, effective from 1985-2000, contained a density limitation (with which GW has constantly complied), and a stated expectation that overall enrollment would stabilize at 20,000 by the year 2000. *See* BZA Order No. 14455 at 7. Although the court of appeals noted that

GW's "sharp expansion of its enrollment in the 1990's made the issue [of the BZA's concerns in 2001 about students in Foggy Bottom] more acute" (App. 4a), it apparently overlooked the fact, acknowledged by the BZA in its Order, that GW's overall enrollment has remained relatively constant since 1985 at between 17,000 and 18,000. (App. 79a.)[3]

The District of Columbia Human Rights Act ("DCHRA") statutorily protects from discrimination a number of classes of persons. One of those protected classes is students. The DCHRA unambiguously prohibits discrimination in housing on the basis of matriculation. *See* D.C. Code § 2-1401.01. (App. 163a.) A 1994 Mayoral Order stated that the DCHRA is "a bedrock statement of the public Policy of the District of Columbia." (Mayor's Order No. 94-132, 41 D.C. Reg. 3252 (1994).) (App. 179a-181a.)

The BZA Orders. On December 28, 1999, GW filed an application for BZA approval of its 2000 Campus Plan. During the hearings on the Campus Plan, representatives of community groups testified generally about their desire to preserve the residential housing stock in Foggy Bottom for non-students. (*E.g.*, D.C. Cir. Joint App. ("Jt. App.") 64-65.) They complained that University residence halls had replaced a number of "residential" buildings, including, notably, several failing hotels (suggesting that residence halls were somehow not residential and students somehow not residents). They complained that the residence of large numbers of students in the neighborhood was purportedly incompatible with a "viable, permanent residential neighborhood, because student residents displace permanent residents, deplete available housing stock, erode the fabric of the neighborhood, and contribute little to the local tax base." (App. 136a.) They also complained that "student renters . . . [had] flooded the private market" (App. 137a) and that

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[3] GW's undergraduate enrollment has increased somewhat while its graduate enrollment has fallen. (App. 79a.)

students were living in increasing numbers in apartment buildings, though they could present no concrete data. (*E.g.*, Jt. App. 141 (admitting that there were no "hard numbers" to back up residents' estimates).)

The Director of the District's Office of Planning ("OP") ultimately supported the neighbors' position that the number of students living in Foggy Bottom was a problem, not because of their behavior (there was virtually no evidence of any misbehavior), but simply because of the sheer number of students (as compared to non-students) who live there. (Jt. App. 369.) Significantly, he testified that GW had satisfied all of the criteria for granting GW's Campus Plan application *except for* number of students. (Jt. App. 154 (also admitting that noise and traffic considerations were adequately dealt with by the University).) OP's primary concern was that the neighborhood was reaching the "tipping point" beyond which it would become a neighborhood of students. (App. 84a; 132a-133a.) OP proposed a "baseline" approach under which the BZA would order that no more than a fixed number of GW students could live in Foggy Bottom. (App. 133a-134a.) The District's Office of Corporation Counsel, however, explained that the DCHRA precluded discrimination against students. (Jt. App. 164-73.) It concluded that "there appears to be a substantial risk that a court could find the OP proposal to be unlawful under one or more of the provisions of the Human Rights Act." (Jt. App. 172.) OP ultimately conceded, due largely to the DCHRA issue, that its "preferred" baseline approach would "'introduce too much complexity' in the proceeding." (App. 134a.)

On March 29, 2001, the BZA entered its Original Order, which predicated approval of GW's Campus Plan on numerous conditions including "Condition 9", which imposed a retroactive freeze on undergraduate enrollment (despite the fact that the admissions process was underway and the precise enrollment was unknown – and unknowable – by the BZA) and a moratorium on non-housing development. (App. 124a-

159a.) The Order reiterated the expressed goals of reducing the number of students off campus, but implemented requirements to achieve its goals in an indirect manner, by requiring GW to house a fixed percentage of its students on campus, which the BZA knew that GW could not immediately do. Due to the dire impact, GW initiated the action below. The district court enjoined enforcement of Condition 9 on substantive due process grounds, holding that Condition 9 "part[ook] of the essence of 'arbitrary and capricious.'" (App. 72a.)

The BZA held various supplemental administrative proceedings at which it heard evidence of the University's expedited plans to build 1100 new beds on campus, and its acquisition of properties just outside its campus boundaries to house 709 more undergraduates. (App. 81a-82a.)[4] The BZA then issued a Remand Order on December 21, 2001 (App. 77a-123a), explicitly adopting the Original Order virtually in its entirety, revising only Condition 9 (addressing the housing of GW's undergraduate students and the construction of buildings on campus for non-residential use) and two other Conditions not relevant here. (App. 116a-119a.) Revised Condition 9 requires the University to provide on-campus housing for a minimum of 5600 full-time undergraduates (70% of 8000), plus one bed for every undergraduate enrolled beyond 8000. This requirement applies (i) regardless whether any such students would choose on-campus housing, (ii) despite the ample supply of University housing (more than 5500 beds on and off campus) already in existence, and (iii) regardless whether GW's undergraduate enrollment were to fall below 8000. Thus, based on GW's Fall 2001 enrollment of 8058, given that only 4120 of its total 5500-plus beds were within the campus boundaries, the Remand Order would have

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[4] All of the properties that the University acquired outside its campus boundaries are in high-density residential or special purpose zones, which permit "dormitory" use as a matter of right. *See* 11 DCMR § 330.5(g); § 350.4(a); and § 501.1.

required GW to secure more than 1500 additional beds by September 2002 – provided its enrollment just remained flat into the Fall.

The housing requirement has two phases. First, recognizing, as it had to, that the University could not develop 1500-plus new on-campus beds overnight, from September 2002 until August 2006, the BZA permitted GW to count toward its required 5600-plus beds not only on-campus beds, but also off-campus beds that the BZA assumed that GW could acquire in short order, provided that they are located *outside* Foggy Bottom/West End altogether.[5] Second, after August 2006, only on-campus housing may be counted. Significantly, at no time did the BZA permit GW to count the existing roughly 1400 beds it already had in properties adjacent to its campus that were permitted by-right under the relevant zoning regulations. (Jt. App. 295.) For any period during which GW is not in compliance with the on-campus housing requirement, there is a moratorium on the construction of any on-campus non-residential facilities. (App. 89a; 118a-119a.)

The Remand Order also retained Condition 10, which provides that the University house all of its freshmen and sophomores on campus, despite the fact that the University had recently spent nearly $25 million on the acquisition and refurbishment of a property in Foggy Bottom just outside its campus boundaries, specifically configuring it for freshmen. (Jt. App. 295, 300.) This property, the former Howard Johnson Hotel, abuts the entrance ramp for Interstate 66, and was recently affirmed by the District of Columbia Court of Appeals as being a by-right "dormitory" use in that zone. *See*

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[5] Remarkably, in its haste to rid Foggy Bottom of student residents, at no time did the BZA consider the effect of transporting 1500-plus undergraduates to and from Foggy Bottom each day on legitimate land use considerations such as traffic, parking or congestion.

Watergate West, Inc. v. D.C. Bd. of Zoning Adjustment, 815 A.2d 762 (D.C. 2003).

Finally, the BZA adopted an extraordinary punitive provision, Condition 9(f), which provided that, if any portion of Condition 9 "is declared void for any reason by any court in any proceeding, no application for a special exception will be processed and no permit to construct or occupy buildings for non-residential use on campus may be issued until and unless the Board thereafter orders otherwise." (App. 119a.) This new provision threatened not only to punish GW for seeking and obtaining judicial relief with respect to Condition 9's revised effects, but also to trump any injunction against the Remand Order.

Though it was apparently not the court of appeals' goal to do so, its own mathematical analysis demonstrated clearly and concisely that the BZA order renders by-right dormitories in Foggy Bottom redundant. The court correctly noted that the Order guarantees that 5600 of 8000 undergraduates will be housed on campus or outside of Foggy Bottom; that 1250 are not suited for dormitory life (married, commuters or the like), and that this leaves 1150 who may live off campus in Foggy Bottom. (App. 13a.) Given that GW already controls 1400-plus beds off campus in Foggy Bottom, it seems inescapable that hundreds of them would be unusable for their intended purpose by the court's own calculus. The BZA well understood both that it could not lawfully prevent GW from using such properties for matter-of-right residence halls (App. 106a); and that the effect of its on-campus housing requirement was to make those off-campus residence halls redundant. (App. 112a ("If the University finds it infeasible to continue their current use, nothing in the record suggests an impediment to their return to pre-existing uses or to long-term [non-student] residential use.").)

The requirement that the University add a new bed for every new undergraduate enrolled compounded Condition 9's adverse impact on the University's operations. It also carried

implications for admissions and other decisions at the core of the University's mission. Requiring additional housing for every additional student would inevitably push the University to prefer students who would accept – and could afford – University housing. It would cost the University far more to admit students who are married, have children or disabilities, or some other attribute that makes on-campus housing infeasible.

In light of the dire, immediate impact of the Remand Order, on April 12, 2002, the district court granted GW's motion for summary judgment, striking down Condition 9's housing requirements and Condition 10 (which required the University to house freshmen and sophomores on campus). The court ruled that the BZA's mandate that the University construct new beds on campus when it had existing capacity just off campus in by-right dormitories was so arbitrary and capricious as to violate the University's right to substantive due process:

> ...[T]he Order arbitrarily forces the University before August 2002 to go to great effort and expense to provide additional housing for 1500 undergraduates, for most of whom it has already lawfully provided housing. . . . . Thus if Condition 9(a)-(c) remains in force, the University faces a choice of damaging evils: it must either on short notice buy or rent additional housing outside of Foggy Bottom for 1500 students' beds, leaving vacant either its residential dormitory space in Foggy Bottom or its newly acquired housing, in order to comply with the Final Order, or abandon its program for on-campus construction of non-residential space until its existing plans to construct additional dormitory space on-campus come to fruition and eventually enable it to come into compliance with the Final Order.

(App. 41a-42a.) The Court also ruled that Condition 9(f), which provided that the BZA could effectively trump any effort to have any aspect of the Order struck down, was

unconstitutional and a violation of the separation of powers. The district court noted in its opinion that while the record before the BZA focused on the perception that student residents were somehow making Foggy Bottom seem "less residential," it contained "no foundation, on the basis of student misconduct or noise-related nuisance" for the BZA's actions. (App. 49a.)

The Court of Appeals' Opinion. The court of appeals disagreed with the district court's analysis. While it undertook a comprehensive analysis of the property interest at issue, and ultimately held that GW did have a protected property interest under the relevant regulations, its analysis fell short thereafter. The court acknowledged that "it seems inescapable that the District is drawing a distinction based on student status." (App. 10a-11a.). The court identified what it believed to be the "implicit basis for the Board's distinction of students from others – namely, that on average they pose a risk of behavior different from that generally preferred by non-student residents" (App. 11a), even though there was no such evidence anywhere in the record. It then characterized the minimal rationality it imputed to the BZA's action: "Given the District's concern that an excess of students in the Foggy Bottom area is negatively affecting the character of the neighborhood, it cannot be irrational for the District to adopt rules likely to limit or reduce the number of students in the area." (App. 13a.)[6]

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[6] The BZA repeatedly attempted to justify its action by noting that the neighborhood was at the "tipping point" of becoming a "university neighborhood" if more students took up residence there. (App. 84a; 132a-133a.) It is unfortunately easy to imagine the other classes of residents whose presence in sufficiently large numbers might cause some neighborhood constituency to become concerned about "tipping points" and the "character of the neighborhood." It is thus important that constitutional boundaries be set for this sort of government-sponsored discrimination.

The court itself thus acknowledged that the BZA's purpose was "to limit or reduce the number of students in the area." (*Id.*) Nevertheless, while it focused directly on the *rationality* of drawing lines based on student status (from its perspective and without evidentiary support), the court of appeals failed to analyze the legitimacy of the BZA's stated government purpose of reducing the number of that class of persons, or indeed, any class of persons, in a particular neighborhood. The court thus put its constitutional imprimatur on regulators devising ways to prevent an entire class of persons from residing in the neighborhood of their choice simply to keep that class of persons out of the neighborhood and thereby preserve its "character." Acknowledging, however, that the BZA's goal may have been facially contrary to the DCHRA, the court of appeals held only that "a breach of local law does not of itself violate substantive due process." (App. 12a.)

The court of appeals also rejected the notion that this sort of disparate treatment in the service of an openly discriminatory and illegitimate motive was independently an equal protection violation because, in its view, "the university does not make a serious analytical case for the proposition that students should be viewed as a 'suspect class' for equal protection purposes." (App. 11a.) The court thus ignored the need for any discriminatory regulation to serve a legitimate public purpose, even if it does not involve a suspect class of persons. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).[7]

REASONS FOR GRANTING THE PETITION

In upholding the BZA's openly and intentionally discriminatory Order, the District of Columbia Circuit applied a standard that dramatically reduces constitutional protections

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[7] The court of appeals also upheld the district court's rejection of GW's separate, facial equal protection challenge to the District of Columbia's "campus plan" scheme, which treats universities differently from other property users. That ruling is not the subject of this petition.

available to citizens who are subjected to arbitrary, unlawful land use decisions. Its decision paves the way for local regulators to impose far-reaching and invasive restrictions on universities in ways that transcend ordinary "Town versus Gown" disputes.

While this Court in recent years has decided cases that clarify the relevant standards for analysis of constitutional challenges to land use regulation in the takings, procedural due process and equal protection contexts, it has not squarely addressed the substantive due process limitations, if any,[8] on local land use regulators' actions that affect protected property interests. This has led the lower courts and commentators alike to bemoan the conflicting state of the law in this area. *See, e.g., Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992) (there is "much-needed uniformity among the federal courts on this subject."); *Anderson v. Collins*, No. 2:96-CV-269, 1998 WL 1031496, at *3 (E.D. Ky. July 14, 1998) (observing that "federal courts' treatment of substantive due process in the area of zoning and land use . . . is unsettled and diverse"); Stewart M. Weiner, Comment, *Substantive Due Process in the Twilight Zone: Protecting Property Interests From Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467 (1996). And, although the court below rejected even the concept of an equal protection claim under a "shadow" due process analysis, other circuits have ruled that the standards are the same.[9]

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[8] *Cf. City of Cuyahoga Falls*, __ U.S. at __, 123 S. Ct. at 1397 (Scalia, J., concurring).

[9] *See, e.g., Gary v. City of Warner Robins*, 311 F.3d 1334, 1339 n.10 (11th Cir. 2002) ("[T]he rational basis test utilized with respect to an equal protection claim is identical to the rational basis test utilized with respect to a substantive due process claim."); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993) (same standard applies to equal protection and substantive due process land use claims); *Unity Ventures v. Lake County*, 841 F.2d 770, 775 n.2 (7th Cir. 1988) (same).

This case presents an opportunity, based on an extensive factual record and two lower court opinions, for the Court to articulate standards against which to judge substantive due process and equal protection challenges to local land use regulation and thereby ensure more consistent treatment of similar claims nationwide. Plenary review of the decision below is therefore warranted.

I. THE COURT SHOULD CLARIFY THAT LAND USE REGULATION MUST SERVE A LEGITIMATE GOVERNMENT PURPOSE TO SURVIVE A SUBSTANTIVE DUE PROCESS CHALLENGE

A. The Case Law Regarding the Analysis of Substantive Due Process Claims in the Context of Land Use Regulation Is a Veritable Quagmire

This Court has emphasized that "[t]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (internal citations and quotation marks omitted). Although the Court's decision in *Lewis* certainly suggests that government action exercised other than "in the service of a legitimate governmental objective" would run afoul of due process protections (at least in the context of executive action), the federal courts' application of the *substantive* aspect of this principle to property owners' challenges to land use regulation by local zoning authorities has been anything but consistent and clear.

As the Sixth Circuit has observed, "the circuits [are] deeply divided concerning the theories to be employed in federal court cases challenging zoning." *Pearson*, 961 F.2d at 1214. Moreover,

> The circuits are in substantial disagreement on the role

> of the federal courts in reviewing zoning claims of [the "arbitrary and capricious" substantive due process] kind. Although the Supreme Court has held that federal review of local zoning on arbitrary and capricious substantive due process grounds is valid in appropriate cases, *it has never laid down definitive standards of review.*

Id. at 1217 (emphasis added) (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373 (1926); and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977)). Indeed, the wide disparity and conflict among the circuit courts' decisions on this topic led the *Pearson* court to exclaim,

> We wish it were within our power to harmonize these decisions, but the conflicts among circuits are too great. *Harmony will have to await action by the Supreme Court.*

Id. at 1220, n.45 (emphasis added).

This Court has addressed the standards applicable in other constitutional challenges to land use actions, particularly in the takings arena. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). And it has recently addressed limited aspects of the due process challenge to land use action that arose out of local regulators' ministerial compliance with (as opposed to defiance of) state legislation. *See City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, __ U.S. __, 123 S. Ct. 1389 (2003). Although the Court has articulated the standard applicable to due process challenges to abusive executive action by government officials, *see Lewis*, 523 U.S. at 845-46, to date it has not revealed standards to be applied by the courts in substantive due process challenges to local land use regulation. This case provides the perfect opportunity for the

Court to harmonize the conflicting and confusing case law, and to establish the definitive constitutional standards governing local zoning authorities' regulation of property development throughout the nation.

The confusion bemoaned by the *Pearson* court in 1992 has, if anything, worsened since then. In the First Circuit, the "dispositive question [in substantive due process analysis] is whether the challenged legislation bears a rational connection *to a legitimate public purpose*." *S. County Sand & Gravel Co. v. Town of S. Kingstown*, 160 F.3d 834, 836 (1st Cir. 1998) (emphasis added). In the Second Circuit, in zoning cases, "'substantive due process . . . standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.'" *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (quoting *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999). *See also* Christopher R. Bryant, Comment, *Zoning Out Due Process: W.J.F. Realty Corp. v. Town of Southampton*, 73 ST. JOHN'S L. REV. 565, 567 (1999) (arguing that the New York Supreme Court's substantive due process decision in *W.J.F. Realty Corp. v. Town of Southampton*, No. 004906/1993 (N.Y. L.J., Dec. 16, 1997), *rev'd on other grounds*, 690 N.Y.S.2d 725 (N.Y. App. Div. 1999), "while in keeping with . . . the Second Circuit, . . . provides municipalities sweeping immunity from due process violations through self-legislated discretion to grant or deny a particular application" (footnote omitted)).

It used to be the case that "[t]he Third Circuit [would] grant relief on the basis of substantive due process where the zoning decision is irrational in the strict sense or prompted by invidious political or discriminatory motives." *Pearson*, 961 F.2d at 1218 (footnote omitted) (citing *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988) and *Pace Res., Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1035-36 (3d Cir. 1987)). Now, however, a property owner pressing a

substantive due process claim against zoning authorities can succeed only by proving that their decision "shocks the conscience." *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003). Reasoning that the standard announced with respect to *executive* abuses in *Lewis*, 528 U.S. 833, "has superceded prior decisions of our Court holding that a plaintiff asserting that a municipal land-use decision violated substantive due process need only show that the municipal officials acted with an 'improper motive,'" *id.* at 394, the court in *United Artists* held that the "shocks the conscience" standard is applicable not only to executive action, but to zoning cases as well, and that "*Bello* and its progeny are no longer good law." *Id.* at 401.

In contrast, the Fourth Circuit applies the traditional "rational basis" test regularly applicable to legislative actions. *See, e.g., Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002) (holding that the challenged zoning determinations "clearly did not fall beyond the outer limits of legitimate governmental action. In fact, quite the opposite is true. The County's actions were *rationally related to a legitimate governmental purpose*." (Emphasis added)); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995) ("In more recent decisions, the Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can survive *only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning*." (Emphasis added)). The Fifth Circuit likewise requires a legitimate government interest: "[G]overnment action comports with substantive due process if the action is *rationally related to a legitimate government interest.* Only if such government action is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare, may it be declared unconstitutional." *FM Props. Operating Co. v. City of Austin*,

93 F.3d 167, 174 (5th Cir. 1996) (emphasis added) (internal quotation marks and citations omitted).

In its decision in *Pearson*, the Sixth Circuit delineated its standards for substantive due process review of decisions by local zoning regulators:

> [S]ubstantive due process requires that both state legislative and administrative actions that deprive the citizen of life, liberty or property must have some rational basis. Federal court review of the two types of action differs in that in reviewing *administrative* action the federal court must make an extremely limited review of the evidence as described above, but in reviewing *legislative* acts, even that is not permitted, the only permissible inquiry -- absent equal protection, First Amendment or other such considerations -- being whether the legislative action is rationally related to legitimate state land use concerns.

Id. at 1223. In setting out these standards, the *Pearson* court nevertheless expressed a preference for employing the "shocks-the-conscience" test to zoning decisions:

> Although the "shocks the conscience" . . . is more apt for cases involving physical force, it is useful in the zoning context too, to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority -- and to underscore the overriding precept that "arbitrary and capricious" in the federal substantive due process context means something far different than in state administrative law.

Id. at 1222 (citations omitted).

In the Seventh Circuit, "[l]and use regulations satisfy substantive due process if they do not violate a specific constitutional guarantee and are rationally related to a *legitimate governmental interest*." *Durigan v. Sanitary Dist. No. 4-Town of Brookfield*, 5 Fed. Appx. 492, 494-95 (7th Cir.

2001) (emphasis added). *See also Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County*, 57 F.3d 505, 514 (7th Cir. 1995) ("In order to claim that a zoning ordinance interferes with its substantive rights, [a claimant] must be able to demonstrate either that the ordinance infringes a fundamental liberty interest, . . . or that the ordinance is 'arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" (Quoting *Euclid*, 272 U.S. at 395) (other citation omitted)).

The "Eighth Circuit judges are in disagreement among themselves as to the correct approach to federal review of local zoning . . . ." *Pearson*, 961 F.2d at 1219 (citing *Lemke v. Cass County*, 846 F.2d 469, 470 (8th Cir. 1987)). *See also Roy v. City of Little Rock*, 902 F. Supp. 871, 874 n.4 (E.D. Ark. 1995) (noting that different 8th Circuit decisions have both recognized and denied the existence of a substantive due process cause of action with respect to land use decisions). The Eighth Circuit has characterized its substantive due process standard as requiring the claimant to demonstrate "something more than that the government decision was arbitrary, capricious, or in violation of state law," to show that the zoning action is "truly irrational." *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992). No decision since then appears to have changed this approach.

The Ninth Circuit "will subject local zoning decisions to substantive due process review, but the scope of review is that for legislation, even as to an individual property owner's claim, and *any relationship to a proper zoning goal*, such as prevention of traffic congestion, will be sufficient." *Pearson*, 961 F.2d at 1219 (emphasis added) (citing *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990). *See also, e.g., Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996) ("To establish a violation of substantive due process in [a zoning] context, a plaintiff is ordinarily required to prove that a challenged government action was 'clearly arbitrary

and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" (Quoting *Euclid*, 272 U.S. at 395)); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993) (stating that the requirement that the challenged action "need only be rationally related to a legitimate state interest . . . also applies to substantive due process challenges to property zoning ordinances" (citations omitted)).

In the Tenth Circuit, on the other hand, "the arbitrary and capricious standard . . . has been applied in the context of zoning." *Crider v. Bd. of County Comm'rs of Boulder*, 246 F.3d 1285, 1289 (10th Cir.), *cert. denied*, 534 U.S. 890 (2001). Moreover, "the arbitrary and capricious standard in the context of zoning does not mean simply erroneous. Rather, such a claim can survive only *if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning.*" *Id.* (emphasis added) (internal quotation marks and citation omitted).

Under the decisions of the Eleventh Circuit, "[t]he substantive component of the Due Process Clause prohibits a government entity from applying to property a zoning classification that bears no relationship to the public health, safety, morals, or general welfare and thus is beyond the government's police power." *Bickerstaff Clay Prods. Co. v. Harris County*, 89 F.3d 1481, 1489 (11th Cir. 1996) (internal quotation marks and citation omitted). *See also Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995) ("Substantive due process challenges to zoning regulations are analyzed under the rational basis standard. Under this standard, a zoning decision will be upheld if it has a rational relationship with a legitimate general welfare concern." (Internal quotation marks and citation omitted)).

Finally, as the court in *Pearson* noted, and as the court of appeals confirmed in this case, "the District of Columbia Circuit applie[s] a very deferential standard of review under

substantive due process. It [has] held that '[o]nly a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983.'" *Pearson*, 961 F.2d at 1219 (quoting *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir.), *cert. denied*, 488 U.S. 956 (1988)).

In sum, the First, Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits employ varying analyses, all of which, however, require consideration as to whether the challenged regulation serves a legitimate government purpose. The Second, Third, Eighth, District of Columbia and, arguably, the Sixth Circuits, on the other hand, as the District of Columbia Circuit did here, decide such cases based only on the rationality of the action, without expressing concern for or requiring consideration of the legitimacy of the purpose behind the action. As a result, not all the circuits are in line with what this Court has implied but never explicitly stated: that zoning decisions cannot survive scrutiny under substantive due process, as forgiving as that scrutiny may be, where the government interest being served is illegitimate, as is true of the BZA's Order in this case.

Granting certiorari in this case will enable the Court to quell the confusion among the appellate courts and to establish definitive, nationwide, standards for substantive due process review.

B. This Court Should Clarify That Substantive Due Process Does Not Permit Local Regulators to Restrict Property Uses for Facially Illegitimate and Discriminatory Purposes

The courts of appeal generally agree on the need to identify, as a threshold matter, a constitutionally protected property interest with which the challenged land use regulation has interfered; they do not always, however, agree on the criteria for identifying such an interest. (App. 5a-7a

(cataloguing circuit split regarding property interest analysis).) In this case, the court of appeals held that GW possessed the requisite property interest, and then moved to the next stage of the analysis.

Beyond the need to identify a property interest, the only consistent thread that emerges in the substantive due process cases from other circuits, as described above, is the requirement of most circuits that any regulation be rationally related to a legitimate government interest. *See*, *supra*, discussion in Part I. A., pp. 15-20.

No doubt the majority of circuits have adopted formulations for due process review that require an analysis of the legitimacy of the public interest served by the regulation at issue because this Court's decisions strongly suggest such a requirement. The Court has emphasized that "[t]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, *or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective*." *Lewis*, 523 U.S. at 845-46 (emphasis added, internal citations and quotation marks omitted). Under decisions dating back to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977), and *Nectow v. Cambridge*, 277 U.S. 183, 189 (1928), the Court has held that zoning regulation will not withstand constitutional scrutiny unless it is rationally related to a legitimate public purpose. Because in most instances the public purpose (at least the expressed public purpose) for the regulation is unimpeachably proper, the focus is usually on the rationality of the means employed to achieve the regulators' legitimate goals.

The court of appeals in this case focused *only* on the rationality side of such an analysis, applying its *Silverman v. Barry* formulation. While GW obviously disagrees with the court's conclusion as to constitutional rationality, the more fundamental manner in which the analysis departs from the

framework applied in seven of the twelve circuits is in failing to address the legitimacy of the government interest expressed. For instance, the Eleventh Circuit has ruled:

> Substantive due process challenges to zoning regulations are analyzed under the rational basis standard. Under this standard, a zoning decision will be upheld if it has a rational relationship with a legitimate general welfare concern. Our recent *Haves v. City of Miami* decision [52 F.3d 918 (11th Cir. 1995)] sets out a two-step procedure determining whether a zoning decision survives such rational basis scrutiny. 52 F.3d at 921-24. "The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate government purpose—a goal—which the enacting government body *could* have been pursuing." *Id.* at 921 (emphasis in original).

Restigouche, 59 F.3d at 1214 (footnote omitted).

In contrast, in its decision below, the court of appeals repeatedly identified the purpose of the BZA actions ("BZA imposed conditions aimed at ... rolling back encroachment into Foggy Bottom by ... students" (App. 2a); and "measures designed to limit the presence of undergraduates," (App. 4a)), but failed to address the facial illegitimacy of such goals under District of Columbia law.

The court ultimately acknowledged GW's argument that the DCHRA prohibited discrimination against students, specifically in housing matters. (App. 11a (citing D.C. Code § 2-1402.21).) The court even quoted the Act's statement that "'it is the intent of the Council of the District of Columbia ... to secure an end in the District of Columbia to discrimination ... by reason of ... matriculation.'" (*Id.*) Rather than apply those principles to the legitimacy of the express purpose of the BZA's Order, however, the panel stated simply, "But even if GW reads District law correctly, a breach of local law does not of itself violate substantive due process." (App. 11a-12a.)

It is, of course, true that every violation of local law is not, by definition, a violation of substantive due process. As the Court noted in *Silverman*, "inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress under [42 U.S.C. § 1983]." 845 F.2d at 1080. But that is only one aspect of the required analysis, and does not mean that a violation that goes to the fundamental legitimacy of the stated governmental purpose is legally irrelevant. Even the court below, in a different context, has made clear that, while every violation does not necessarily constitute a due process violation, some do, and they must be analyzed accordingly. *See Tri County Indus. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (holding that "the manner in which the violation occurs as well as its consequences are crucial factors to be considered" (quoting *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 944 (D.C. Cir 1988))).

It appears that the court of appeals in this case misapplied the "violation of state law" principles that have been applied in challenges to the *means* by which properly motivated governmental action is carried out (*e.g.*, *Comm. of U.S. Citizens*, 859 F.2d at 944-45), to the violation here, which defines the governmental *ends* or purpose as illicit and unlawful, and thereby infects the entire action. It is difficult to envision any way that the BZA's goals, as articulated by the appellate court itself, could be found to be proper government purposes, particularly in the District of Columbia in the face of its Human Rights Act. Were this standard to be adopted and applied in other land use cases, it would send a message to zoning officials that they were free to craft legislation designed to exclude any class of persons (other than those protected be federal law) from particular neighborhoods. This message creates the potential for far-reaching mischief, especially insofar as it will be sent to those officials already struggling to resist vocal community members' efforts to keep one class of resident or another out

of "their" neighborhood. This Court should grant certiorari in order to make clear that regardless of the rationality of the *means* used by land use regulators to achieve their desired end, substantive due process requires that the end be consistent with a legitimate government interest, as defined by reference to local law.

C. A Heightened Standard of Review Should Apply in Assessing the Legitimacy of Regulations That Interfere with a University's Fundamental Self-Governance

GW argued in the court of appeals that, as explained above, the BZA's action was particularly problematic insofar as it carried with it far-reaching implications regarding University policies and practices. The BZA Order interferes not only with the more obvious University decisions such as whether to be a predominantly "residential" university, and whether to construct a new physics lab, business school or other non-residential project that the BZA would prevent until the requisite housing was developed. The BZA requirement that the University provide an additional bed for every student, regardless of whether that student would use it, would pressure the University to alter its admissions practices, as students who could not or would not occupy (and pay for) an on-campus bed would cost the University far more to admit.

The court below ignored the impact of a zoning board dictating such fundamental university self-governance. It dismissed the University's arguments as to the irrationality of the BZA effectively requiring GW to house an unprecedented percentage of its undergraduates, commenting only that some prestigious universities house higher percentages of their undergraduates. (App. 13a.) Other universities also admit students with lower, and some higher, average SAT scores than does GW. And some other universities house none of their students. Courts have recognized, however, that such decisions are beyond the purview of local land use regulators. *See, e.g., In re Summit Sch. v. Neugent*, 442 N.Y.S.2d 73, 77

(N.Y. App. Div. 1981) (observing that conditions "which may intrude upon the educational processes of the [school], as opposed to their use of real property, are contrary to public policy"); *Inc. Vill. of Brookville v. Paulgene Realty Corp.*, 200 N.Y.S.2d 126, 134 (N.Y. Trial Term 1960) (in striking down portion of zoning ordinance that limited number of students on parcel of property, noting that "[i]t is clear from a reading of [the zoning enabling law] how far the [zoning authority] has strayed outside the field of zoning"), *aff'd*, 218 N.Y.S.2d 264 (N.Y. App. Div. 1961), *aff'd*, 11 N.Y.2d 672 (1962).

While the BZA's action in this case would no doubt constitute unconstitutional interference with any property owner's rights due to the facial illegitimacy of the stated purpose of the regulation, GW's university status warrants a heightened level of review. First, in contrast to the BZA's treatment of GW and its students in this case, educational uses of the land are favored because of the presumed ways in which schools and universities serve the public welfare. "[C]ourts regard educational [land] uses as worthy of special consideration," and therefore "carefully scrutinize municipal regulations which tend to limit schools, and they hold invalid regulations which unreasonably restrict their educational functions." 2 *Anderson's American Law of Zoning* § 12.09, at 530 (Kenneth H. Young ed., 4th ed. 1996). *See also Glenbrook Rd. Ass'n v. D.C. Bd. of Zoning Adjustment*, 605 A.2d 22, 32 (D.C. 1992) ("[I]t has long been recognized . . . that universities serve the public welfare and morals in important ways . . . . In general, uses of land for educational purposes are 'highly favored.'"); *Cornell Univ. v. Bagnardi*, 503 N.E.2d 509, 513 (N.Y. 1986) (stating that colleges and universities "by their very nature, singularly serve the public's welfare and morals").

As this Court long ago said, "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently

promoted." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). The principle that universities should have freedom to chart their own courses, "freedom of the university from external control over its academic undertakings," has roots predating our Constitution. Frederick J. Crosson, *Two Faces of Academic Freedom*, in *The Challenge and Promise of a Catholic University* 45, 47 (Theodore M. Hesburgh ed., 1994). In 1819 this Court decided the landmark case of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), in which it held that a state legislature could not, by changing a college's charter, interfere with its governance. As one commentator has explained, the *Dartmouth College* case "put the American college beyond the control of popular prejudice and passion; *** it also put the colleges beyond the control of people who understood neither the colleges nor their problems." Frederick Rudolph, *The American College and University: A History*, 211 (1990).

For these reasons, the federal courts have since cautioned that government, and even judicial, interference in university administration must be as narrow as possible to carry out legitimate regulation. *See Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993) ("We are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations."); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.").

This Court has recognized that the Due Process clause protects "fundamental liberty interests" from unreasonable governmental interference. *Glucksberg*, 521 U.S. at 721. *See also City of Cuyahoga Falls*, __ U.S. at __, 123 S. Ct. at 1397 (Scalia, J. concurring) (substantive due process protects "fundamental liberty interests," even if not regulation of

land). In *Glucksberg*, the Court explained that one of the important criteria in determining whether such a liberty interest merited substantive due process protection was whether it was "so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." 521 U.S. at 727. Academic freedom is just such a deeply-rooted interest.

GW has never contended that it, or any other university, should be free from legitimate land use regulation. It does, however, contend that its status as a university, and the historic protection of our universities' academic freedom as such, should warrant the courts reviewing under a stricter standard any regulation that goes beyond imposing reasonable limits on the externalities of university operation, such as traffic, noise and crowding, and that interferes with the University's ability to chart its own course. The Court should grant certiorari in order to establish such a heightened standard of review.

II. THIS COURT SHOULD CLARIFY THAT THE DISPARATE TREATMENT OF A CLASS OF PERSONS FOR AN ILLEGITIMATE GOVERNMENT PURPOSE IS AN EQUAL PROTECTION VIOLATION EVEN THOUGH THE AFFECTED PERSONS ARE NOT WITHIN A "SUSPECT CLASS"

Addressing the University's argument under *Silverman*, 845 F.2d at 1080, that this case presented a clear example of a "group animus" toward students (which seems hard to deny), the court acknowledged that it seemed "inescapable" that the BZA had drawn lines based on student status. (App. 10a.) The court then diverted its course, however, and abruptly concluded that students were not a "suspect class" and that "creation of a sort of shadow equal protection doctrine in the name of 'substantive due process' seems just the sort of error against which we and others have cautioned." (App. 11a

(citing *Tri County*, 104 F.3d at 459).) The court of appeals thus held that, because students were not a protected class in the constitutional jurisprudence, there should be no cognizable claim that their disparate treatment amounted to a constitutional violation, whether under a substantive due process or equal protection rubric, regardless of the stated motive.

Equal protection challenges to discriminatory regulation involving non-suspect classes are subject to "rational-basis" review. *Cleburne*, 473 U.S. at 452. As the Court more recently explained:

> Under rational-basis review, where a group possesses "distinguishing characteristics relevant to interests the State has authority to implement," a State's decision to act on the basis of those differences does not give rise to a constitutional violation. [*Cleburne*] at 441. "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."

Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366-67 (2001) (quoting *Heller v. Doe,* 509 U.S. 312, 320 (1993). The Court in *Garrett* recognized the practical reality that government regulators often do not articulate their purposes for regulation; therefore, the courts are entitled to assume a purpose – a rational basis – for the classification unless demonstrated otherwise. *Id.* at 367. The Court then, however, restated the "widely acknowledged tenet of this Court's equal protection jurisprudence that state action subject to rational-basis scrutiny does not violate the Fourteenth Amendment when it 'rationally furthers the purpose *identified by the State*,'" thus assuming that, if a purpose is articulated, it would be legitimate. *Id.* (emphasis added) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)). It is apparently this standard that the court of

appeals applied, upholding the regulation despite its articulated *improper* purpose.

This Court has not addressed the situation where, as here, the local government regulators *do* articulate their purpose, whereby no assumptions as to purpose are necessary, but the purpose is facially illegitimate under the local law. There, of course, the means devised tautologically serve the "purpose identified by the state," but may well not bear any relationship to legitimate zoning concerns. Thus, whether that regulation bears any relation to a "legitimate public purpose" is an entirely different question in this case than whether it serves the "purpose identified by the state." The Court should clarify this gap in the jurisprudence by explaining that the articulated purpose is determinative for equal protection purposes. Tolerating local regulators themselves defining the goals they must serve paves the way for land use decisions that draw lines based on personal attributes rather than uses of the land.

It is for just these reasons – that regulators should not make zoning distinctions based on the occupation of the user of the land rather than the use of the land – that state courts that have considered similar efforts by local regulators to prevent students from encroaching on residential neighborhoods have struck them down as unconstitutional. Indeed, this Court declined to review Maryland's highest court's decision in *Kirsch v. Prince George's County*, 626 A.2d 372 (Md.), *cert. denied*, 510 U.S. 1011 (1993), in which the Maryland Court of Appeals struck down a county "mini dorm" ordinance under both federal and state constitutions because it imposed conditions on student houses in residential neighborhoods that were not imposed on houses occupied by non-students. The court in *Kirsch* reasoned that differentiation between tenant classes "based solely on the occupation which the tenant pursues away from that residence is that sort of arbitrary classification forbidden under our constitutions." *Id.* at 380. *See also Coll. Area Renters & Landlord Ass'n v. City of San*

Diego, 50 Cal. Rptr. 2d 515, 516 (Cal. Ct. App. 1996) ("mini-dorm" regulation an equal protection violation).

In this case, the anti-student motive was transparent and indeed openly acknowledged, despite the existence of a statute forbidding such discrimination. Even though the BZA action was expressly *not* based on student behavior, the court of appeals assumed an "implicit basis for the Board's distinction of students from others – namely that they pose a risk of behavior different from that generally preferred by non-student residents and legally relevant." (App. 11a.) The basis could only have been *implicit*, given that, as noted above, there was no evidence to prove that any such stereotypical prejudices about student behavior were warranted.

The danger inherent in a federal court condoning local regulation that implicitly or explicitly characterizes any class of persons as undesirable neighbors "unsubstantiated by factors which are properly cognizable in a zoning proceeding" *Cleburne*, 473 U.S. at 448, is manifest. The implications are infinitely more troublesome when the characterization is rationalized by the court's own construction of an "implicit basis" grounded in broad, prejudicial assumptions about the likely behavior of that entire class of persons. This Court should grant certiorari in order to confirm that the constitutional guarantee of equal protection prohibits land use regulators from discriminating between classes of persons based on their status rather than on their use of land.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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